Supreme Court, U.S.
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No. 95-1123

In The

Supreme Court of the United States

October Term, 1995

JERRY GODBY,

Petitioner,

vs.

ELECTROLUX CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN F. WYMER, III
Counsel of Record
MARC A. TAYLOR
POWELL, GOLDSTEIN, FRAZER & MURPHY
Attorneys for Respondent
16th Floor
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 572-6600

8405
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTIONS PRESENTED

I. Did the Court of Appeals properly affirm the District Court's grant of summary judgment in favor of Electrolux on Godby's age discrimination claim?

II. Did the Court of Appeals properly affirm the District Court's grant of summary judgment in favor of Electrolux on Godby's retaliation claim?

LIST OF PARTIES

All parties having an interest in this lawsuit are listed on the title page of this document.

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Respondent, Electrolux Corporation ("Electrolux"), respectfully submits that Petitioner Jerry Godby's ("Godby") Petition for Writ of Certiorari ("Petition") should be dismissed. Godby seeks review of the Eleventh Circuit's decision affirming the United States District Court for the Northern District of Georgia's grant of summary judgment in favor of Electrolux. As discussed below, the Eleventh Circuit's decision presents no conflict with the decisions of any other United States Court of Appeals or with the decisions of this Court. Moreover, the Eleventh Circuit's decision was the result of a careful and thorough analysis of the undisputed facts presented to the District Court. Accordingly, the Petition raises no issue worthy of this Court's review.

OPINIONS BELOW

The District Court opinion granting summary judgment to Electrolux is reported at *Godby v. Electrolux Corp.*, 1994 U.S. DIST. LEXIS 19831, 66 Fair Empl. Prac. Cas. (BNA) 1704 (N.D.Ga. 1994), and is reprinted in the Petition. The Eleventh Circuit affirmed the District Court's ruling without opinion on May 30, 1995. That decision is reported at *Godby v. Electrolux Corp.*, 58 F.3d 641 (11th Cir. 1995) (per curium), and is reprinted in the Petition. Godby's Suggestion for Rehearing En Banc was denied by the Eleventh Circuit on August 9, 1995. That decision is reported at *Godby v. Electrolux Corp.*, 65 F.3d 185 (11th Cir. 1995), and is reprinted in the Petition.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the Eleventh Circuit was invoked pursuant to 28 U.S.C. § 1291, as an appeal of right from the District Court's final order granting summary judgment in favor of Electrolux. The District Court had federal question jurisdiction under 28 U.S.C. § 1331.

STATUTORY PROVISIONS INVOLVED

Rule 56 of the Federal Rules of Civil Procedure

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*

The Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq.*

28 U.S.C. § 1254(1)

STATEMENT OF THE CASE

A. Proceedings And Dispositions Below

This is an employment discrimination case in which Godby alleges that Electrolux discharged him in February, 1992, and refused to rehire him in March, 1992, because of his age (40) in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.* R1-1.[1] Alternatively, Godby asserts that Electrolux discharged him, and subsequently refused to rehire him, in retaliation for "protesting" alleged sex discrimination against his wife, Patrice Godby, in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*[2]

Following extensive discovery, Electrolux filed a motion for summary judgment as to both claims. R2-31. On September

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1. Citations to the Record will be in this form: R (volume number) — (document number) — (page number, if applicable).

2. As discussed below, it is not clear whether Godby has now abandoned the age discrimination claim as his Petition focuses primarily on his retaliation claim.

26, 1994, District Court Judge Orinda Evans granted Electrolux' motion for summary judgment. R4-46. Godby filed an appeal to the Eleventh Circuit on October 18, 1994. R4-51. On May 30, 1995, the Eleventh Circuit affirmed the District Court's judgment in favor of Electrolux without opinion. On June 20, 1995, Godby filed a Suggestion for Rehearing En Banc, which was denied by the Eleventh Circuit on August 9, 1995. This Petition followed.

B. Statement of Facts

Electrolux submits that this is not the proper forum to argue the facts of this matter. Nonetheless, arguing the facts is all that Godby seems to do in his Petition and the "facts" as set forth by Godby require comment and correction. As has been his practice throughout this litigation, Godby's factual recitation is incomplete and replete with material inaccuracies. Indeed, at various points in his Petition, Godby relies on "evidence" which is simply non-existent in the record.

Rather than dissect Godby's "facts" as Electrolux was compelled to do at both the District Court and the Eleventh Circuit levels, Electrolux instead directs the Court's attention to the District Court's Order granting summary judgment (R4-46) as an independent source discussing the factual background of this case. In addition, the briefs submitted by Electrolux in the District Court (R2-31) and at the Court of Appeals offer a full description of the facts of this case. What follows below is a brief summary of the case addressing some of the more glaring misstatements contained in Godby's Petition.

Godby's Petition attempts to leave the impression that Godby's employment history was stellar and free from disagreement until his wife secretly tape recorded a conversation

with her supervisor in May of 1991.[3] However, the record reflects that as early as February of 1989, Godby was having disputes with his supervisors and was the subject of complaints concerning his performance.

For example, on February 5, 1989, three years prior to his discharge and approximately twenty-seven months prior to the taping incident, Godby sent a memorandum to various Electrolux officers criticizing the Human Resources Director who, according to Godby, "belittled me in the eyes of my department and the Executive Committee." I Godby Dep. Ex. 1. On July 3, 1989, almost two years prior to the secret taping incident, Godby received a 1988-89 performance evaluation in which he was rated "marginal" in the area of "Coordination: Ability to work with others toward common goals and objectives. . ." I Godby Dep. Ex. 3. During this review, which Godby refused to sign, he was rated "competent minus" in the area of "Interpersonal Skills." *Id.* That was not a good evaluation.

Although Godby's 1989-90 performance rating improved to "superior/competent," Godby was still dissatisfied with the amount of his raise. As a result, on August 22, 1990, Godby sent a memo to John Horigan, one of Godby's superiors, complaining

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3. While on maternity leave, Ms. Godby secretly tape recorded a conversation with her supervisor, Richard Luisi, during which Luisi made some tasteless remarks. P. Godby Dep. p. 3, 29, Ex. 1. Although Godby tried to keep the tape recording a secret, Electrolux later learned of the recording and asked for a copy of the recording in order to take appropriate action. Godby refused to let anyone hear the tape. I Godby Dep. p. 69. Electrolux' request for a copy of the tape recording, along with Godby's refusal to turn over a copy of the recording, constitute the alleged "protest" upon which Godby's retaliation claim is based. It should be noted that at the end of her maternity leave Ms. Godby returned to work at Electrolux at her regular salary. P. Godby Dep. pp. 39-40.

that "it is very obvious that my accomplishments over the past years have not received due consideration." I Godby Dep. Exs. 5, 7. On March 22, 1991, Godby wrote another memorandum to Horigan concerning a meeting on the previous day in which Horigan discussed complaints he was receiving about Godby's "lack of urgency in procurement of goods." I Godby Dep. Ex. 11. It is undisputed that these performance problems and interpersonal friction arose well before Godby's alleged "protest."

In addition to the problems mentioned above, there were other occasions prior to the time of the secret tape recording when Godby violated policy, but which the Company did not find out about until after the tape recording. Those incidents included Godby fabricating a memorandum and forging Horigan's signature to it, and charging personal car repairs for his secretary's car to a corporate account. I Godby Dep. pp. 162-163, 165, Exs. 15, 16; Malone Dep. p. 137; Horigan Dep. p. 95, Ex. 11.

Godby's performance problems that existed prior to his wife's secret tape recording continued unabated after the tape recording incident. On October 12, 1991, Godby responded to a preliminary discussion of his 1991 performance evaluation by sending his manager, Horigan, a memorandum stating that "I am not pleased with the merit review I received from you. . . . I think you base your opinion of my skills . . . on negative feedback you hear from apprehensive complainers. . ." and "you are wrong to judge my interpersonal skills negatively." I Godby Dep. Ex. 18. Godby further stated that "You are also incorrect in your opinion of my administration skills. No one can perform this job better than me. To indicate that I fail to undertake projects or meet deadlines is incorrect."[4] *Id.*

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4. Godby's actual review occurred on November 7, 1991. Godby was rated as "marginal" in the areas of "Implementation and Controlling" and "Interpersonal Skills." I Godby Dep. Ex. 17. Although Godby's overall rating

(Cont'd)

On November 25, 1991, Horigan, after learning of the forgery and fabricated memorandum, reprimanded Godby and recommended that Godby's scheduled 3% pay raise be postponed until 1992. Horigan Dep. pp. 95-96. On December 10, 1991, Godby again responded in writing: "I do not appreciate the implication that I created a criminal act against you or this organization;" Godby expressed disappointment that Horigan had "such a supine opinion of [his] character." I Godby Dep. Ex. 17. This belligerent and defensive memorandum was the final straw as far as Godby's employment was concerned. After Horigan received what the District Court aptly described as Godby's "densely-worded memorandum" (R4-46 p. 17), Horigan decided that he had had enough of Godby's antics and decided to discharge him.[5] Horigan Dep. pp. 118-119.

On February 10, 1992, Electrolux notified Godby that his job was being eliminated. I Godby Dep. p. 184; II Godby Dep.

(Cont'd)
was "competent/marginal," he nonetheless received a 3% raise. I Godby Dep. Exs. 17, 21.

5. Godby's defensive reaction to criticism of his job performance continued up to the time of his termination. One such caustic response to criticism of his job performance occurred on January 18, 1992, when he sent a memorandum to Gary Griffin, Electrolux' Vice President for Sales, blaming others for lengthy delays in obtaining marketing materials. I Godby Dep. Ex. 19. Around that same time, Godby drafted a memorandum to Thomas Albani, President of Electrolux, complaining about various perceived slights, including his salary, Horigan's reprimand of him for the forgery, the low rating an outside consulting firm gave his job, and his having been counselled for using the corporate account to pay for repairs on a personal vehicle. Godby stated: "the people who complain about me are the ones that I have noticed to be the *thriftless spenders* in the organization" (emphasis in the original). I Godby Dep. Ex. 20. In the memorandum, Godby suggested that he would resign if Albani agreed with Horigan. I Godby Dep. pp. 180-181. In that document, as well as in all the other Godby memoranda, Godby made no mention of age discrimination, retaliation or of his wife's tape recording.

Ex. 40; Horigan Dep. p. 118. Because this action was treated as a "job elimination," Electrolux was able to pay Godby thirty weeks of severance pay and four weeks of vacation pay, totalling $25,330.00. II Godby Dep. Ex. 40. Had Electrolux chosen to treat Godby's separation as a discharge "for cause," Godby would have been ineligible for severance pay. Malone Dep. p. 162.

Following Godby's discharge, various Electrolux managers gave him reference letters to aid him in his job search. I Godby Dep. Exs. 24, 28. When Godby requested that he be rehired as a sales representative; Electrolux agreed to do so. I Godby Dep. pp. 186-187. Electrolux further offered Godby a $550 per week guarantee, which he turned down. *Id.* p. 189. Godby had poor sales, missed sales meetings, spent a lot of time looking for another job and was ultimately dismissed from the sales job at his request. *Id.* p. 199, Ex. 30. Godby does not challenge Electrolux' decision to discharge him from his sales position.

SUMMARY OF THE ARGUMENT

The District Court properly dismissed Godby's age discrimination and retaliation claims because they lack factual support and are based upon speculation and Godby's conclusory allegations. The Eleventh Circuit Court of Appeals correctly affirmed the dismissal. The sole reason now advanced by Godby in support of his Petition is that the lower courts improperly disregarded alleged disputed material facts which, according to Godby, should have precluded summary judgment. The record does not support that contention.

In fact, the record evidence was thoroughly considered and carefully reviewed by the courts below and summary judgment was properly granted. In assessing the merits of Godby's claims, the District Court carefully and painstakingly reviewed the

entire record, ferreting out the many demonstrable misstatements, half-truths and outright fabrications contained in Godby's pleadings. Godby adduced no evidence to support a reasonable inference that he was discharged and subsequently not rehired because he was forty or in retaliation for allegedly "protesting" sex discrimination. Godby's discharge resulted from a series of cumulative incidents, including (1) fabricating a memorandum and forging his manager's signature to it without his manager's knowledge or permission, (2) failing to obtain necessary supplies and materials in a timely fashion, (3) reacting with hostility and belligerence anytime his conduct or performance was questioned, (4) being accused by his secretary of sexual harassment, and (5) charging personal car repairs for his secretary's car on a corporate account. Although the discharge decision was largely performance driven, Electrolux humanely chose to treat the discharge as a job elimination in order to allow Godby the benefit of receiving over twenty-five thousand dollars in severance pay and other Company benefits for which he would have been disqualified had he been discharged for cause.

The Eleventh Circuit, having reviewed the entire record, affirmed the District Court's findings. In both courts, the correct legal standards were applied. The District Court properly applied the summary judgment analysis mandated by *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), and its progeny. In disposing of Godby's age discrimination and retaliation claims, the District Court relied upon this Court's analysis for Title VII and ADEA claims as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973); *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981); and *Hicks v. St. Mary's Honor Center*, __ U.S. __, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). The Eleventh Circuit, in subjecting Godby's appeal to *de novo* review, made an independent determination of the District Court's grant of

summary judgment. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1993); *Browning v. Peyton*, 918 F.2d 1516 (11th Cir. 1990).

This case is not suited for Supreme Court review because none of the various "questions" presented by Godby concern conflicting decisions of the various Courts of Appeal or involve important questions of federal law. The decision below is consistent with this Court's precedent as well as that of the other Circuit Courts of Appeal. The case has already been fairly decided by the District Court and affirmed twice by the Court of Appeals; there is no reason for further review by this Court.

REASONS FOR DENYING THE WRIT

I.

GODBY'S PETITION DOES NOT PRESENT A PROPER QUESTION FOR REVIEW.

A review on a writ of certiorari is not a matter of right, but one of judicial discretion. "A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. None of the various items proposed for review by Godby involve the types of issues that this Court concerns itself with — Godby is not seeking review of a case involving conflicting decisions of the various Courts of Appeal or involving important questions of federal law. Sup. Ct. R. 10.

Rather, Godby's Petition is limited to his attempt to have this Court review the factual findings made by the District Court in granting summary judgment. Godby lists three questions for review by this Court. In reality, all three questions posed by Godby ask the same question: did the District Court fail to note genuine issues of material fact which should have precluded

summary judgment? Stated differently, Godby wants this Court to review the record and pass judgment on the District Court's factual findings and the Eleventh Circuit's affirmance of those findings. This is the only matter proposed by Godby for review, and this Court should decline Godby's invitation.

A petition for a writ of certiorari is rarely granted when the asserted error consists solely of erroneous factual findings. Sup. Ct. R. 10. It is not the place of this Court "to reappraise the evidence unless it plainly fails to support the findings of the trier of facts." *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 753, 96 S. Ct. 2337, 2350, 49 L. Ed. 2d 179 (1976). In this case, where a 38-page order was issued which dissects the facts of the case in minute detail, it cannot be said that the evidence fails to support the findings of the District Court as affirmed by the Eleventh Circuit. Godby's Petition should be denied on this basis alone.

II.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON GODBY'S CLAIMS.

Beyond the fact that Godby's Petition fails to present a proper question for review by this Court, the record fully supports the District Court's decision granting summary judgment in favor of Electrolux and the Eleventh Circuit's affirmance of that decision.

A. Godby's Age Claim Was Properly Dismissed.

In disposing of Godby's age discrimination claim, the District Court properly utilized the standards enunciated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973); *Texas Dept. of Comm. Affairs v. Burdine*, 450

U.S. 248, 101 S. Ct. 1089 (1981); and *Hicks v. St. Mary's Honor Center*, __ U.S.__, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). R4-46-p. 27. To establish a prima facie case of age discrimination under the *McDonnell Douglas* framework, Godby had to show that (1) he was a member of the protected age group, (2) that adverse employment action was taken against him, (3) that he was replaced by someone from outside the protected age group, and (4) that he was qualified for the position for which he was rejected.[6] *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989). Once Electrolux articulated legitimate business reasons for Godby's termination, Godby had the burden of showing that the reasons articulated for his termination were actually a pretext disguising Electrolux' discriminatory motive. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081 (11th Cir. 1990).

The District Court held that Godby had succeeded in creating a material issue of fact with respect to his prima facie case. R4-46-p. 28. Nonetheless, summary judgment was granted because Godby failed to establish an issue of fact as to whether the legitimate business reasons offered by Electrolux for his discharge were pretextual. R4-46-p. 29-34. In his Petition, Godby has apparently elected not to challenge the dismissal of his age claim.[7] Moreover, even if Godby elected to pursue his age claim, his age claim was still properly dismissed. As discussed below with respect to Godby's retaliation claim, Godby failed to create a genuine issue of fact as to pretext.

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6. In Electrolux' view, this case is a job elimination case mandating a different formulation of the *McDonnell Douglas* framework. R2-32-16. Under either framework, however, summary judgment is appropriate on Godby's age claim because he failed to rebut Electrolux' legitimate reasons for discharging him.

7. Godby's age claim is mentioned but not argued in his Petition.

B. Godby's Retaliation Claim Was Properly Dismissed.

In order to establish a prima facie case of retaliation, Godby had to show that: (1) he engaged in protected opposition to Title VII discrimination; (2) an adverse employment action was taken simultaneous with or subsequent to such opposition; and (3) there is a causal link between the protected activity and the adverse employment action. *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Cir. 1993); *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600 (11th Cir. 1986); *Perryman v. Johnson Products Co.*, 698 F.2d 1138, 1142 n.8 (11th Cir. 1983).

The District Court found that Godby produced enough evidence to satisfy the first two prongs of a prima facie retaliation claim.[8] Although Electrolux disagrees with that specific finding, the District Court further held that Godby could not establish a causal connection between his "protest" and his discharge some eight months later, and for this reason granted Electrolux summary judgment on Godby's retaliation claim. The District Court further concluded that even if Godby had established a prima facie case, he failed to produce evidence sufficient to create an issue of fact as to whether the reasons articulated by Electrolux for his discharge were pretextual.

The District Court properly held that merely complaining about alleged discrimination followed several months later by an adverse action is insufficient, in itself, to defeat summary judgment. There must be some evidence of a causal link between the alleged protest and the adverse employment action. Where,

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8. Electrolux respectfully disagrees that Godby engaged in conduct protected under Title VII because he never "protested" anything. *See* Brief in Support of Defendant's Motion for Summary Judgment, R2-32, and Brief of Appellee.

as here, evidence of such motivation is lacking, summary judgment is appropriate. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913 (11th Cir. 1993). Not only is evidence of causation lacking here, the surrounding circumstances actually disprove any connection between Godby's discharge and his "protest."

1. The eight-month time lapse between the tape recording and Godby's discharge refutes any causal link between the two events.

The timing of Godby's discharge alone disproves the suggestion that his discharge was causally connected to the alleged protest on behalf of his wife. The discharge occurred in February, 1992, approximately eight months after Godby's wife taped Luisi. The passage of a substantial period of time between the alleged protected activity and the adverse employment action is an important consideration in determining whether there is a nexus sufficient to establish a prima facie case of retaliation. *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600 (11th Cir. 1986).

In this instance, where many months elapsed from the time Ms. Godby taped Luisi until the date of Godby's discharge, the required nexus is simply not present. *EEOC v. Fuchs Baking Co.*, 43 FEP Cas. (BNA) 752 (S.D. Fla. 1987) (where one year had passed, plaintiff could not show the required nexus). Courts in other circuits addressing this issue have similarly held that a substantial gap between the protected activity and the adverse action can disprove the required causal nexus. *See, e.g., West v. Fred Wright Constr. Co.*, 756 F.2d 31 (6th Cir. 1985); *Maldanodo v. Metra*, 743 F. Supp. 563 (N.D. Ill. 1990); *Reeves v. Digital Equipment Corp.*, 710 F. Supp. 675 (N.D. Ohio 1989).

The inference of causation is further negated given what happened *after* the taping and before Godby's discharge:

- Charges of sexual harassment were lodged against Godby by his secretary, Junie Julian;

- Godby manufactured a memorandum purporting to be from his manager, Horigan, and then forged Horigan's signature;

- Godby wrote numerous scathing memoranda to various Electrolux managers;

- It came to light that Godby charged Julian's car repairs to a Company account[9];

- Godby was counselled by Horigan for contacting a consulting group which had questioned the utility of Godby's job. I Godby Dep. Ex. 20.

Viewed separately or collectively, these incidents, which are undisputed and arose because of Godby's own conduct, were far closer in time to Godby's discharge than the taping, thus negating the required "retaliatory" causal link.

2. *Retaliation is further disproved by Electrolux' conduct towards Godby following his termination.*

The circumstances surrounding and following Godby's discharge further disprove a retaliatory motive:

- Following his discharge, Godby asked to become a sales representative. The Company granted his request and even went so far as to offer him a $550 per week salary guarantee so that he would not be entirely

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9. Godby subsequently attempted to collect money from Julian for the car repairs *after* she charged him with sexual harassment. Julian Aff. ¶ 2.

dependent on commissions for his income. I Godby Dep. p. 189. Electrolux made this offer at a time when Godby was already being paid his full salary due to the thirty-four weeks of separation pay he received.

- The Company's decision to eliminate Godby's job, rather than discharge him for cause, is also inconsistent with the theory that the Company wanted to retaliate against him. If Electrolux had the punitive motive which Godby seeks to ascribe to it, it would have discharged Godby for cause so he would not receive separation pay. This is equally true of the decision to pay Godby a year-end bonus because the Company met its "cash flow quota" for 1991. Malone Dep. Ex. 9.

- Various Electrolux managers, including the Chief Financial Officer, provided Godby with references which he used liberally in his efforts to secure new employment. I Godby Dep. Exs. 24, 28. One of the reference letters was given to Godby even after he filed his first EEOC charge. I Godby Dep. Ex. 28.

Such behavior is entirely inconsistent with the contention that Electrolux harbored any animus toward Godby. The District Court, in granting Electrolux summary judgment, recognized this fact.

C. Even If Godby Had Established A Prima Facie Case Of Age Discrimination Or Retaliation, Summary Judgment Was Still Appropriate Because Godby Failed To Demonstrate A Genuine Issue Of Fact As To The Issue Of Pretext.

Godby's Petition sets forth eight alleged factual disputes which he claims demonstrate pretext with respect to the reasons

for Godby's termination. These issues have previously been discussed in great detail, both in the District Court and Eleventh Circuit. Nonetheless, out of an abundance of caution, Electrolux will once more briefly respond to each of the points raised by Godby in his Petition.

1. Luisi's comments are undisputed.

Electrolux does not dispute that Luisi made inappropriate remarks to Ms. Godby.[10] Although the "merits" of Ms. Godby's situation are not material to this case, Electrolux makes the following observations with respect to this issue. First, Ms. Godby, who returned to work at Electrolux at the end of her maternity leave, never filed an EEOC charge or sought other formal relief as a result of Luisi's comments. Second, there is no dispute that Luisi, who previously worked in the same office as Ms. Godby, transferred to a different office while Ms. Godby was on leave and that no one was hired to be his secretary upon his relocation. I. Godby Dep. p. 83. Third, if Luisi truly preferred another secretary merely because of Ms. Godby's parenthood, he would not have asked her to return to work early from her leave, as Ms. Godby claims he did on several occasions. P. Godby Dep. pp. 19-20. Finally, the issues in *this* case are alleged retaliation and age discrimination as to Mr. Godby, all other issues are immaterial and, whether they are disputed or not, are insufficient to overcome summary judgment.

2. Godby was told his wife could be sued for secretly tape recording her supervisor.

Electrolux does not dispute that Godby was told his wife's

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10. Electrolux does, however, dispute that "Luisi told Ms. Godby he did not want her working for him now that she had a baby." Godby Petition, p. 9. This blatant mischaracterization of Luisi's comments is a good example of the liberties Godby takes with the record.

clandestine tape recording was illegal. On the other hand, Electrolux categorically denies that Godby was told that Luisi may sue his wife "if she pursues the matter further." Godby Petition, pp. 10, 12. This is perhaps Godby's greatest misstatement to this Court. Not surprisingly, Godby fails to cite any record evidence to support this allegation. Godby cannot cite to the record because no such statement exists; Godby simply made it up.

3. The "interrogation" of Godby consisted of Electrolux attempting to ascertain the veracity of the Godby's allegations concerning Luisi.

Godby argues that the various requests made by Electrolux managers to listen to the tape recording constitute evidence of retaliation. Godby Petition, pp. 10-12. Repeatedly referring to Electrolux' efforts to hear the tape recording as an "interrogation," Godby states that "the extraordinary scrutiny which he encountered as a result of his wife recording Luisi infers (sic) that Electrolux management was very concerned about the Godby's complaint regarding discriminatory conduct." Godby Petition, p. 12.

Although Electrolux questions Godby's depiction of the attempts to hear the tape recording as "interrogation," Electrolux is in full agreement that its managers were deeply and properly concerned about allegations of misconduct on the part of Luisi. Electrolux might have been subject to Title VII liability if it had failed to investigate claims of sex discrimination lodged against one of its managers. The reason that Electrolux wanted to discuss the recording with Godby was because he refused to provide Electrolux with a copy of the tape.[11] Absent

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11. It was not until Godby initiated this lawsuit that a copy of the tape was finally made available to Electrolux.

substantiating proof concerning Luisi's comments, Electrolux had no way to fully investigate and, if necessary, remedy the matter.

Given that Godby was in possession of evidence which could substantiate his wife's allegations against Luisi, it is far from surprising that Electrolux wanted to listen to a copy of the recording, which Godby refused to allow. Far from demonstrating a protest over his wife's treatment, Godby's conduct in refusing to provide evidence of an alleged improper statement by an Electrolux manager bordered on insubordination.

Godby's use of the word "interrogation" in describing Electrolux' attempts to hear the tape is, of course, intended to conjure up images of Gestapo-like coercion. During his two depositions, Godby himself never once described his discussions about the tape as "interrogations." Certainly Godby did not feel particularly "coerced" or "interrogated" in light of his adamant refusal to let anyone hear the tape. The point is simply this — Electrolux asked Godby to let someone listen to the tape so that Electrolux could take appropriate action, and he refused. That is not protected conduct under Title VII.

4. *Godby's final performance evaluation was consistent with his past performance.*

Godby next argues that pretext is established by the fact that his November, 1991 performance evaluation was allegedly a radical departure from a supposed history of outstanding performance at Electrolux. This is yet another gross mischaracterization of the record. As previously discussed, in addition to having a history of performance problems and disputes with his managers dating back to at least February of 1989, Godby received a substandard review in 1989, which he

refused to sign. I Godby Dep. Ex. 3. It could not be clearer that Godby had a disturbing history of sending memoranda expressing dissatisfaction regarding his pay, lack of appreciation, and other perceived slights. I Godby Dep. Exs. 1, 6, 7, 11.

Moreover, other incidents occurred prior to November of 1991 which affected Godby's final review. Electrolux did not find out about the sex harassment complaints about Godby until August 1991. It was not until October/November 1991 that Horigan learned of Godby's forgery. Equally important, Horigan did not become Godby's immediate supervisor until August, 1990. Different supervisors frequently view similar conduct in dissimilar fashion; it appears Horigan may have been less willing than some of Godby's previous supervisors to tolerate Godby's performance/conduct problems, which worsened over time.[12]

5. The reasons given by Electrolux for Godby's discharge did not shift and were not inconsistent.

Godby argues that pretext is shown by Electrolux' alleged "shifting explanations" for his termination. Godby says that Electrolux changed its position three times with respect to the articulated reasons for his discharge, going from "economic reasons to performance-related reasons to 'had enough' with Godby." Godby Petition, p. 19. Godby's attempt to portray as

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12. Godby points to his 3% raise in November of 1991 as evidence of pretext. However, there was nothing about the granting of a raise that would suggest pretext. The raise Godby received in November of 1991 was less than the raise Godby had complained about the preceding year. I Godby Dep. Ex. 7. Moreover, after learning of the falsified memorandum and forgery, Horigan postponed the raise, and that was before Horigan received Godby's December 10, 1991 rebuttal memorandum which, in Horigan's words, "was the straw that broke the camel's back." Horigan Dep. p. 121.

"shifting" Electrolux' reasons for firing him is simply another Godby misstatement of the record.

Godby does not dispute that any of the performance/conduct reasons which led to his termination occurred. Electrolux has already explained the "Godby-friendly" reasons why Godby's termination was called a job elimination, rather than a discharge for cause.[13] More important, there is no dispute that Godby's job was in fact eliminated and that cost savings were achieved.

Electrolux did not suddenly change its position regarding the reasons for Godby's termination in its motion for summary judgment, as Godby claims. Godby Petition, p. 18. That claim is categorically and demonstrably false, and Godby knows it is false because he made the same misrepresentation in both the District Court and Court of Appeals, which Electrolux pointed out. R3-34-p. 54. The undisputed facts, as noted by the District Judge, are that Electrolux expressly referred to Godby's performance and conduct problems in its EEOC response.[14]

Godby's assertion that Horigan's statement that he finally "had enough" of Godby's antics somehow represents a switch

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13. Godby also cites the various letters of recommendation as evidence of pretext. Like several of Godby's arguments, this one illustrates the old adage "no good deed goes unpunished." Obviously after twenty years, Godby had friends who wanted to help him move on. Moreover, the letters refer only to Godby's ability to cut costs; they say nothing that is inconsistent with the reasons that Electrolux has articulated for eliminating his position. I Godby Dep. Ex. 24, 28. Neither is paying Godby a year-end bonus based on the Company's having met its 1991 goals, nor rehiring Godby with an offer of a guaranteed salary, evidence that Electrolux wanted to retaliate against Godby. Malone Dep. Ex. 9.

14. Godby's conduct and performance problems were discussed for three pages in Malone's affidavit submitted to the EEOC. Malone Dep. Ex. 4.

from the performance/conduct related reasons articulated for Godby's discharge is puzzling. Horigan finally "had enough" of Godby precisely because he was tired of dealing with Godby's performance/conduct problems. To suggest that this represents a shifting reason for Godby's termination is, at best, nonsensical.

6. Godby's harassment of his secretary does not reflect pretext.

Godby makes two arguments with respect to the charge of sex harassment lodged against him by his secretary, Junie Julian, and the investigation that ensued. First, Godby argues pretext is shown because another Electrolux employee accused of sex harassment, Larry Perryman, was allegedly treated more favorably than Godby in that Perryman was only disciplined and not discharged as Godby was. Then Godby argues that pretext is shown because he was not disciplined by Electrolux as a result of his secretary's allegations.

Godby's attempt to compare himself with Perryman fails for a number of reasons, the most fundamental of which is that Godby was not similarly situated to Perryman. In making this argument, Godby ignores the cumulative effect of his performance and conduct problems. Perryman did not falsify a memorandum and then forge his manager's signature; Perryman did not repeatedly respond defensively and with belligerence to any type of criticism or counselling. As such, Perryman's alleged situation offers no evidence of pretext since Perryman is not similarly situated. *Mitchell v. Toledo Hospital,* 964 F.2d 577, 583-84 (6th Cir. 1992).

Electrolux agrees that it did not formally discipline Godby as a result of Julian's allegation. Rather, Julian was permitted to transfer away from Godby. However, there is no dispute that the matter was investigated and that Godby was spoken to regarding

the incident. Moreover, a number of Julian's allegations came to light *after* the initial investigation. Godby acknowledges that he was subsequently spoken to about the mysterious disappearance of various personal items belonging to Julian from Julian's desk and about Godby's unauthorized charging of Julian's car repairs to the Electrolux corporate account. I Godby Dep. pp. 147, 149.

The critical point about the sexual harassment charges against Godby is this — if Electrolux had chosen to believe Julian's accusations and disbelieve Godby's denials, it could have fired Godby on the spot. That Electrolux choose not to do so in fact disproves pretext.

7. Horigan's delay in discussing the forged memorandum with Godby does not suggest pretext.

Godby's argument that Electrolux waited six months from the discovery of the forgery until using it to justify his discharge (Godby Petition, p. 26) holds no water for a number of reasons. First, as held by the District Court, *Horigan* did not actually learn of the forged memorandum until October or November, 1991. R4-46-pp. 16-17 n. 10. Godby himself expressly acknowledged this fact in the District Court. R3-34-p. 40.

Secondly, that Horigan did not immediately bolt down to Godby's office to fire him on the spot again disproves pretext. If, as alleged by Godby, Horigan had been looking for a chance to retaliate against Godby, that would have been a golden opportunity. The fact that Horigan did not instantaneously reprimand Godby about the forgery further demonstrates that Horigan was not "out to get" Godby.[15]

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15. Although Godby states that the forgery was not mentioned in his November, 1991 review, it is undisputed that as a result of the forgery, Horigan decided on November 25, 1991 that Godby's annual raise should be postponed. Horigan Dep. Ex. 11.

Finally, as stated by the District Court, there is nothing suspicious about the relatively short time lag between Horigan's discovery in October/November 1991 of the forged memorandum and his confrontation of Godby in light of Horigan's status as a senior executive for a large corporation. R4-46-p. 30. Stated differently, there was more to Horigan's job than just dealing with Godby, although dealing with Godby's behavior and compulsive memo-writing was beginning to take up more and more of Horigan's time.

8. The elimination of Godby's job does not suggest pretext.

Godby's final pretext argument is that Electrolux failed to show why it selected Godby's position for elimination, as compared to any other position in the Company. This argument, raised for the first time in this Petition, is particularly desperate. Godby apparently believes Electrolux bears the burden of justifying why Godby's position, as opposed to some other position, was selected for elimination. The answer to why Electrolux eliminated Godby's position is because Godby was in it. Since Electrolux had decided to dismiss Godby, it *had* to be Godby's position which was eliminated (as opposed to outright firing Godby for cause) if Godby was going to collect severance pay.

CONCLUSION

Godby's Petition for Writ of Certiorari should be denied. The Eleventh Circuit's affirmance of the District Court's decision is not in conflict with that of any other Circuit, nor do the issues at hand involve important questions of federal law that should be settled by this Court. This case is a straightforward employment discrimination lawsuit, one which was dismissed because it lacked factual support. The resources of the Court should not be wasted on this case any more than they already have and the Petition should be denied.

Respectfully submitted,

JOHN F. WYMER, III
Counsel of Record
POWELL, GOLDSTEIN, FRAZER & MURPHY
Attorneys for Respondent
Sixteenth Floor
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 572-6600